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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 126-1996
September 17, 1996

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A media request for access to all records concerning an agreement between the University of British Columbia, Coca-Cola Bottling Ltd., and other third parties

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on June 19, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by Stanley L. Tromp, a reporter with The Ubyssey, a student newspaper (the applicant), of a decision of the University of British Columbia (UBC; the public body) to withhold information from many records concerning an exclusive sponsorship agreement between the University of British Columbia, Coca-Cola Bottling Ltd. (Coca-Cola, a third party), and other third parties. The exclusive sponsorship agreement, dated August 1, 1995, is discussed below as the Cold Beverage Agreement; related documents are also in dispute. The other third parties include the Alma Mater Society of UBC (AMS), Spectrum Marketing Corporation, InPrint Media Sales Ltd., Cott Beverages West Ltd., Gray Beverages Inc., and Versa Services Ltd. The Graduate Student Society of UBC submitted to me that it was mistakenly named as a third party, since, unlike the other third parties, it is not involved in the Cold Beverage Agreement.

2. Documentation of the inquiry process

The applicant, who is a UBC student, requested copies of all records concerning the Cold Beverage Contract arrangements between Coca-Cola and UBC from its origins to the date of the applicant's access request. The University provided some information to the applicant but withheld most of the records under sections 14, 17, and 21 of the Act.

3. Issues under review at the inquiry

The primary issues in this review are whether UBC has properly applied the exceptions to disclosure found in sections 14, 17, and 21 of the Act to the records in dispute. These sections are as follows:

Legal advice

14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

Disclosure harmful to the financial or economic interests of a public body

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

(a) trade secrets of a public body or the government of British Columbia;

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

...

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

(e) information about negotiations carried on by or for a public body or the government of British Columbia.

....

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or
(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

...

(iii) result in undue financial loss or gain to any person or organization, or ...

....

There is a preliminary issue which I must address. With the consent of UBC, the applicant submitted additional information to me after the inquiry period ended. UBC agreed to the applicant providing two newspaper articles concerning exclusive sponsorship agreements at two American universities. However, the applicant also provided other information in his submission and the public body objects to this. I will return to this matter below.

4. The records in dispute

The records in dispute include the Cold Beverage Agreement, the Administration Agreement, and other miscellaneous records. They consist of more than 209 pages of contracts and correspondence between UBC and the third parties for the period March to December, 1995. UBC withheld 6 pages under section 14 of the Act, 61 pages under section 17, and 112 pages under section 21 for a total of 179 pages withheld.

5. The Ubyssey's case

The applicant represents The Ubyssey student newspaper. He wants access to all records associated with the Cold Beverage Agreement, including contracts, negotiations, memos, reports, letters, phone conversation records, and legal advice. He is aware of the confidentiality clause of the agreement but believes that it is overridden by the Act, especially by the provisions in it for severing.

6. The University of British Columbia and Coca-Cola Bottling Ltd.'s (third party) case

UBC and Coca-Cola, which made a joint submission, state that from "the outset of the discussions that led up to the Cold Beverage Agreement, UBC and Coca-Cola agreed that all negotiations and any resulting agreement would be confidential. The Cold Beverage Agreement contains an express obligation of confidentiality." They did so in the belief that "disclosure would cause serious financial and economic harm to each of them and would give their respective competitors an undue benefit." (Submission of UBC and Coca-Cola, paragraphs 2.1, 2.2) I have presented below, as I found it appropriate to do so, details of their joint submissions under section 14, 17, and 21.

UBC emphasizes that almost all of the revenue that UBC receives from Coca-Cola over the life of the Cold Beverage Agreement will be spent on improving access for disabled and

handicapped persons to the premises and programs of UBC. (Submission of UBC and Coca-Cola, paragraph 3.10; Affidavit of David W. Strangway, President, UBC, paragraphs 5-8; and Affidavit of John Lane, Physical Access Advisor, UBC)

7. Submissions of other third parties

The president of the Alma Mater Society/UBC Student Union submitted that its records and books are available for inspection by members of the society. Although he recognizes the confidentiality clause in the Cold Beverage Agreement, his view is that he would accept a decision by me that disclosure of the contents of the agreement is in the best interests of all concerned.

The president of Spectrum Marketing Corporation, which advised UBC in this matter, submitted that disclosure of the records in dispute would have a prejudicial effect on his business. (See also the Affidavit of Dale Boniface)

8. Discussion

The submissions of the applicant have alerted me to the fact that the exclusive contract with Coca-Cola has caused at least some stir on the UBC campus since its announcement. I must emphasize that I have no authority to pass judgment on the legitimacy or appropriateness of a publicly-funded university entering into such exclusive arrangements. The applicant acknowledges that it is not within my “mandate or ability to reform the free market economy in Canada.” (See Reply Submission of the Applicant, pp. 1-7, and the Reply Submission of UBC and Coca-Cola, paragraph 4.1) My task is simply to determine whether UBC acted appropriately in withholding certain records in dispute from the applicant under various sections of the Act.

Late submissions by the applicant

UBC and Coca-Cola objected to the late submission on June 29, 1996 of various arguments and documentary items (the “additional material”) by the applicant, when they had agreed to the late filing of only two newspaper items. Since I can state that they have had no bearing on my decision under section 14, 17, and 21 of the Act, and agree with UBC and Coca-Cola that the additional material is irrelevant on its face, I see no reason to give UBC an opportunity to respond to these late submissions with another reply submission.

Section 14: Legal advice

UBC made a submission as to why six pages should not be disclosed to the applicant under this section, which would “divulge both the existence and the content of advice from UBC’s legal counsel.” (Submission of UBC and Coca-Cola, paragraphs 5.1-5.3)

Based on this submission and my own review of the records, I find that six pages were appropriately withheld from disclosure under this section.

Section 17(1): Disclosure harmful to the financial or economic interests of UBC

UBC and Coca-Cola provided me with extensive affidavit evidence to the effect that disclosure of any of the records in dispute, not only those initially identified by UBC for this purpose, would harm their respective financial or economic interests. Under section 17, only the interests of UBC are relevant. I have reviewed these affidavits and the attached submissions carefully, each of which has also been made available to the applicant. (See Submission of UBC and Coca-Cola, paragraphs 3.1-3.18, 6.1-6.18 and the accompanying affidavits) I am not in a position to reveal information disclosed to me in two *in camera* affidavits that supplemented the open affidavits of the Vice-president for External Affairs of UBC and the General Sales Manager for Coca-Cola in British Columbia. I found this UBC argumentation and evidence very persuasive.

In general, UBC states that its financial situation requires it to become more entrepreneurial in finding new sources of funding for worthy purposes, such as improving access on campus for the disabled: "Some of UBC's entrepreneurial ventures will require the same umbrella of commercial confidentiality, which would routinely apply in transactions between two private enterprise bodies. If such commercial confidentiality cannot be given, UBC will lose many new lucrative funding opportunities." (Submission of UBC and Coca-Cola, paragraph 3.4)

The Cold Beverage Agreement is a campus-wide exclusive sponsorship arrangement that permits UBC and the Alma Mater Society to earn substantial benefits from Coca-Cola. Disclosure of sensitive information exchanged in the negotiations or the contract terms would damage UBC's existing relationship with Coca-Cola and prejudice "well-advanced plans to make corporate partnership agreements with other suppliers." (Submission of UBC and Coca-Cola, paragraphs 3.6, 3.8)

UBC argues that disclosure of the records in dispute could reasonably be expected to result in undue financial loss to it and undue financial gain to its competitors, including other universities and colleges, hospitals, and municipalities. It would also mean disclosure of "highly sensitive commercial information that belongs to UBC and that has substantial monetary value." (Submission of UBC and Coca-Cola, paragraphs 3.11-3.12)

On the basis of a detailed review of the records in dispute, I find that disclosure of the records withheld under the terms of sections 17(1)(a), (b), (d), and (e) could reasonably be expected to harm the financial or economic interests of UBC.

Section 21: The confidentiality agreement in the Cold Beverage Agreement

UBC and Coca-Cola provided me with extensive affidavit evidence to the effect that disclosure of the records in dispute would harm their respective financial or economic interests. Under section 21, only the interests of Coca-Cola are relevant; those of UBC were considered under section 17. I have reviewed these affidavits carefully and the attached submissions, each of which has been made available to the applicant. (See Submission of UBC and Coca-Cola, paragraphs 3.1-3.18, 7.1-7.38, and the accompanying affidavits) I found this evidence very persuasive. I am also not in a position to reveal information disclosed to me in three *in camera* affidavits that supplemented the open affidavits of the Vice-president for External Affairs of

UBC, the General Sales Manager for Coca-Cola in British Columbia, and the President of Spectrum Marketing, a consultant to UBC.

In general, Coca-Cola argues that disclosure of its information in the records in dispute "would confer an unwarranted advantage on Coca-Cola's competitors in the intensely competitive soft drink industry," give them possession of a valuable document about how to structure a sophisticated sponsorship transaction and, further, give them access to the financial considerations affecting the final agreement. Disclosure would also interfere significantly with Coca-Cola's negotiating position with other third parties for comparable agreements. (Submission of UBC and Coca-Cola, paragraphs 3.13-3.17)

The most important and relevant point that can be made is that the confidentiality clause in the Cold Beverage Agreement, which I have had an opportunity to review on an *in camera* basis, and the contents of the record in dispute, explicitly reflect the specific language of each of the three tests under section 21 of the Act. These are exactly the tests that Coca-Cola, or any other third party, must establish in order to create a mandatory exemption whereby UBC, or any other public body under the Act, "must refuse" to disclose information harmful to the business interests of a third party.

This is the first time that I have reviewed a contract explicitly designed to establish, up front, the terms and conditions for compliance with section 21(1), which I have called for in other Orders. (See Order No. 11-1994, June 16, 1994, p.12; Order No. 21-1994, August 15, 1994, p. 6; and Order No. 19-1994, July 26, 1994, p. 4)

I find the UBC arguments and evidence on section 21 persuasive. Therefore, I agree with the submission of UBC and Coca-Cola that disclosure of the records in dispute would reveal commercial, financial, or technical information of Coca-Cola, reveal information explicitly supplied in confidence, could reasonably be expected to harm significantly Coca-Cola's competitive position or interfere significantly with its negotiating position, and could result in undue financial loss to Coca-Cola. (Submission of UBC and Coca-Cola, paragraphs 7.1-7.38) However, I am not persuaded that either section 21 or section 17 can be applied to the signatories to the contract.

9. Order

Under section 58(2)(b) of the Act, I confirm the decision of the University of British Columbia not to release the records to the applicant with the exception of the signatories to the contract.

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David H. Flaherty September 17, 1996
Commissioner